No. 1037

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CHARLES ELMORE CROPL
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

STATE OF UTAH,

Respondent.

vs.

ALBERT EDMUND BARLOW,
Utah Case No. 6737

Appellant.

MORRIS QUINCY KUNZ,
Utah Case No. 6738

Appellant.

DAVID BRIGHAM DARGER,
Utah Case No. 6739

Appellant.

IANTHUS WINFORD BARLOW,
Utah Case No. 6740

Appellant.

DR. RULON CLARK ALLRED,
Utah Case No. 6741

Appellant.

OSWALD BRAINICH,
Utah Case No. 6742

Appellant.

(CONTINUED ON SECOND PAGE OF COVER)

PETITION FOR REHEARING

CLAUDE T. BARNES,
J. H. MCKNIGHT,
KNOX PATTERSON,
ED. D. HATCH,
O. A. TANGREN,
Counsel for Appellants.

(CONTINUED FROM FIRST PAGE OF COVER)

EDMUND F. BARLOW,
Utah Case No. 6743

Appellant.

ARNOLD BOSS,
Utah Case No. 6744

Appellant.

HEBER KIMBALL CLEVELAND,
Utah Case No. 6745

Appellant.

LOUIS ALMA KELSCH,
Utah Case No. 6746

Appellant.

JOHN YATES BARLOW,
Utah Case No. 6747

Appellant.

JOSEPH WHITE MUSSER,
Utah Case No. 6748

Appellant.

JOSEPH LYMAN JESSUP,
Utah Case No. 6749

Appellant.

ALMA ADELBERT TIMPSON,
Utah Case No. 6750

Appellant.

CHARLES FREDERICK ZITTING,
Utah Case No. 6751

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PETITION FOR REHEARING

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Notwithstanding our profound respect for this ultimate Court, we are duty bound to indicate that somehow, in dismissing this appeal, the Court has overlooked our most important point—the necessity of evidence to overcome a presumption of innocence, and a denial of due process where that rule is ignored. We blame ourselves for not being so explicit as our sincere conviction warranted.

The Court has evidently decided this matter under the theory that the defendants maintained that religious belief is a defense to a state statutory crime; but the defense

here is not that—it is that the State neither alleged, nor proved, a crime; on the contrary, it ignored a presumption of innocence and inferred a guilty intendment in the use of the word "cohabit" in the stipulation, all in denial of due process under the Fourteenth Amendment. The defendants have never claimed that they had a right to practice plural marriage, or unlawful cohabitation because of their religious belief; their claim in this case is that there was *no evidence* to show that they did *anything* wrong.

All that we have to work on is the brief order of this Court, as follows:

> "*Per Curiam*: The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Davis v. Beason, 133 U. S. 333. Reynolds v. United States, 98 U. S. 145."

Now, it is not for us to say that the Court should give counsel the benefit of its reasoning in denying jurisdiction; but such would be most helpful in determining the basis for a petition for rehearing. Relying on the few words of the order of dismissal, we are compelled to believe, therefore, that it is founded on the Reynolds and the Davis cases. If that be so, the decision not to take jurisdiction is erroneous because those cases decided only that religious belief is no defense to a state crime. Here no crime was established, if the right of presumptive innocence be adhered to; and the religious belief of the defendants is not germane. The sole question is: Did the evidence show that they committed a crime? If not, they have been denied their right to due process under the 14th Amendment.

The gist of defendants' contention is set forth on page 4 of the STATEMENT AS TO JURISDICTION. We quote:

> "The appellants, throughout the cause, had a right to due process of law as set forth in the 1st, 5th, 6th

and 14th Amendments to the Federal Constitution, and it is here maintained that a presumption of innocence in an accused is one of the basic principles of the law of the land. The judgment of the lower court, and that of the Supreme Court of Utah, presumed that the word 'cohabit' as set forth in the stipulation had only *one* meaning, to-wit a guilty one as used in both the statute and the stipulations; whereas, in truth, the word is equally one of innocent import, standing alone without proof."

That was the defendants' case—"standing alone without proof".

This appeal was to decide whether evidence was required to overcome presumption of innocence as guaranteed by the due process clause; but the Court, apparently, has taken the view that it is an appeal on religion as a defense.

We concede, and we have all along conceded, that both the Reynolds case and the Davis case might apply where proof in the record showed the commission of a like crime. No such proof is in this record.

We say, therefore, the defendants have, through this oversight, been denied their appeal. We consequently not only petition for a rehearing, but also for such a withholding of mandate of *procedendo* as this Court may deem advisable.

Respectfully submitted,

CLAUDE T. BARNES,
J. H. MCKNIGHT,
KNOX PATTERSON,
ED. D. HATCH,
O. A. TANGREN,
Counsel for Appellants.

We respectfully certify that this petition for a rehearing is presented in good faith and not for delay.

CLAUDE T. BARNES,
J. H. MCKNIGHT,
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ED. D. HATCH,
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